Ex post facto & not raised ?
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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 461

WILLIAM STEVENS COAKER,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

Opinion of Texas Court of Criminal Appeals, April 29, 1953. (R. 5, 6.) *Coaker v. State*, ... Tex. Crim. Rep. ....., 259 S. W. 2d 220.

Opinion first motion for rehearing, April 10, 1953 (R. 10) *Coaker v. State*, ... Tex. Crim. Rep. ....., 259 S. W. 2d 221.

STATEMENT OF THE CASE

Petitioner was duly and legally indicted for the felony offense of driving while intoxicated, second offense, on November 7, 1952, and on November 17, 1952, Petitioner was tried before a jury in the District Court of Karnes County, Texas and convicted for the felony offense of driving while intoxicated, second offense, and his punishment was assessed at a fine of $2,000.00 and confinement in the County Jail for 90 days (R. 2).

An appeal was taken by Petitioner to the Court of Criminal Appeals of Texas, the Court of last resort in criminal cases in the State of Texas. On April 29, 1953, judgment of the trial court was affirmed, *Coaker v. State*, ____ Tex. Crim. Rep. ____, 259 S. W. 2d 220 (R. 5). Petitioner filed a motion for rehearing which was overrled June 10, 1953, *Coaker v. State*, —— Tex. Crim. Rep. ____, 259 S. W. 2d 221. (R. 10). Petitioner then filed a second motion for rehearing and for the first time attempted to raise a federal question but failed to do so. (R. 11-12). Said second motion for rehearing was overruled by the Court of Criminal Appeals without written opinion on June 27, 1953 (R. 13, 21). Petitioner then filed a motion for leave to file a third motion for rehearing and to recall mandate on July 13, 1953 (R. 13-14), and tendered therewith for filing his third motion for rehearing (R. 15-19). On July 13, 1953, the Court of Criminal Appeals of Texas denied leave to Petitioner to file his third motion for rehearing (R. 20) and by separate order granted Petitioner's motion to recall mandate and granted a stay pending application for writ of certiorari to the U. S. Supreme Court (R. 20-22).

It is pointed out to this Honorable Court that nowhere in the record, and particularly in Petitioner's Bill of Exceptions and Motion for New Trial, did Petitioner attempt to specifically set up or claim any title, right, privilege or immunity under the Constitution of the United States until his third motion for rehearing and a motion for leave to file said third motion was overruled by the Court of Criminal Appeals of Texas.

JURISDICTION

1. Nowhere in the trial record, and particularly in Petitioner's Bill of Exceptions and Motion for New Trial, did Petitioner specially set up or claim any title, right, privilege, or immunity under the Constitution of the United States.

2. The grounds of error here presented were never urged in any manner before the trial court and under the rules of practice in the Court of Criminal Appeals in Texas, the Court could not consider such alleged errors.

3. A substantial Federal question never having been properly raised in the State Court Proceedings, the State Court could not and did not pass on any such question and therefore this Court is without jurisdiction to consider Petitioner's Petition for Writ of Certiorari and the same should be denied.

ARGUMENT AND AUTHORITIES ON JURISDICTION OF THE SUPREME COURT

As its first proposition in opposition to the petition of William Stevens Coaker, the Respondent calls the attention of this Honorable Court to the fact that at no time has Petitioner complied with the jurisdictional requirements of this Court concerning its review of State decisions by Writ of Certiorari.

Petitioner seeks to invoke the jurisdiction of the Court under 28 U.S.C. 1257(3) without complying with the requirements of such statute in setting up or claiming any right, title, privilege or immunity under the Constitution of the United States at the appropriate time in the State proceedings.

A review of the record discloses that the question here presented was never raised in the Petitioner's Motion for a New Trial (R. 3, 4), in any Bills of Exceptions presented to the Court of Criminal Appeals, or in Petitioner's First Motion for Rehearing (R. 7-10). Petitioner admits in his brief (Petition, p. 5) that the question presented was not raised in the trial court. That the first time the question here presented was even attempted to be raised was in Petitioner's Second Motion for Rehearing, (R. 11-12), in which Petitioner admits in his Petition for Writ of Certiorari and Brief (Petition, p. 7) such Second Motion failed to fully point out wherein the conviction contravened the Federal constitution. Realizing that even at this late point of the proceedings he had still not properly raised a Federal question, Petitioner then sought to file a Third Motion for Rehearing and raise such a question for the sole purpose of obtaining review before this Honorable Court. (R. 13-19). The Motion for Leave to file said Third Motion for Rehearing was overruled by the Court of Criminal Appeals as being without merit for the obvious reason that the question presented had not been properly raised in the Petitioner's Bills of Exceptions or Motion for a New Trial so as to give the Court of Criminal Appeals jurisdiction to pass upon same.

The scope of review by the Court of Criminal Appeals of Texas is limited to the grounds or assignments of error which a defendant has preserved by an adequate Bill of Exception, and Motion For a New Trial in the trial court. The Texas Court has expressly held that such motions as are not thus set

up or assigned cannot be considered by it on appeal. *Zweig v. State*, 74 Tex. Crim. Rep. 306, 171 S. W. 747; *Harvel v. State*, 126 Tex. Crim. Rep. 581, 72 S.W. 2d 604; and this course has been followed even in a death penalty case where on appeal complaint was first made of matters not objected to or excepted to during the trial. *Fisher v. State*, 107 Tex. Crim. Rep. 383, 2 S.W. 2d 249.

This Honorable Court has repeatedly stated that the litigant must follow State procedures in raising the Federal question. That any failure to do so is fatal to his chances for Supreme Court Review. That when required by State practice, the Federal question must be raised before the trial court, and must be presented to the trial court at the point considered appropriate under State procedure. As early as 1877, this Honorable Court advanced and adhered to the policy that it did not have jurisdiction of an alleged violated right that was not pointed out in the trial court, when required to be raised in the trial court for State Court appellate review. Spies, 31 Lawyer's Edition 80. Subsequent to that time the Court's policy has remained the same and can be seen in *Hulbert v. Chicago*, 202 U.S. 275, 50 L. Ed. 1026, 26 S.Ct. 617. (Complete failure to raise question at trial court level); *Brown v. Massachusetts*, 144 U.S. 573, 12 S.Ct. 757, 36 L. Ed. 546 (failure to raise question before verdict held to be fatal); *Edelman v. California*, 97 Lawyer's Edition 227 (question raised for first time as one of grounds of appeal); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 47 L. Ed. 480; 23 S.Ct. 375, 63 L.R.A. 33 (failure to raise the question both in trial court and on appeal).

As shown by a review of the record in this case and by Petitioner's own admission, a Federal question was not raised in the trial court either by Bills of Exceptions or in his Motion for a New Trial as required under Texas procedure, and was only raised for the first time in Petitioner's Third Motion for Rehearing.

This Honorable Court has further adhered to the principle that raising the Federal question for the first time in a petition for rehearing addressed to the highest court is insufficient unless the court actually entertains the petition and expressly decides the question. *Radio Station W.O.W. v. Johnson*, 326 U.S. 120, 65 S.Ct. 1475, 89 L. Ed. 2092; *Herndon v. Georgia*, 295 U.S. 441, 55 S.Ct. 794, 79 L. Ed. 1930; *American Surety Co. v. Baldwin*, 287 U.S. 156, 53 S.Ct. 98, 77 L. Ed. 231; *Forbes v. State Council*, 216 U.S. 396, 30 S.Ct. 295, 54 L. Ed. 534; *Simmerman v. Nebraska*, 116 U.S. 54, 6 S.Ct. 333, 29 L. Ed. 535. To constitute a reviewable judgment under such circumstances, the order denying the petition for rehearing must be more than a cursory recitation that the petition has been fully or maturely considered and accordingly denied. *Consolidated Turnpike Co. v. Norfolk and O.V.R. Co.*, 228 U.S. 326, 33 S.Ct. 510, 57 L. Ed. 857. See also *McCorquodale v. Texas*, 211 U. S. 432, 29 S.Ct. 146, 53 L. Ed. 269, wherein this Honorable Court said:

> This court has decided many times that it is too late to raise a Federal question for the first time in a petition for rehearing in the Court of last resort of a State after that Court has pronounced its final decision. *Loeber v. Schroeder*,

149 U.S. 580, 585; Pim v. St. Louis, 165 U.S. 273. *It is true that we have also decided that if the Court entertains the motion and passes on the Federal question, we will review its decision. But it must appear that the Court has done so.* Mallett v. North Carolina, 181 U.S. 589; *Leigh v. Green*, 193 U.S. 79; Cokran Oil Co. v. Arnaudet, 199 U.S. 182, 193; Fullerton v. Texas, 196 U.S. 192; McMillen v. Ferrum, 197 U.S. 343. It can hardly be said to so appear in the case at bar. The order of the Court is nothing more than a denial of the motion. In other words it expresses no more than would lie implied from a simple denial of the motion." (Emphasis added.)

As before pointed out the Court of Criminal Appeals overruled Petitioner's motion for leave to file his tendered Third Motion for Rehearing on the grounds that said Third Motion for Rehearing was without merit. That under the Texas decisions cited, supra, the only reasonable interpretation to the Court's ruling on said motion could be that Petitioner had not properly raised the question presented in the trial court under Texas procedure and therefore had waived same.

In view of the above decisions and the adherence of this Honorable Court to a well defined policy requiring any Federal question to be properly raised under state procedure, Petitioner has failed to invoke the jurisdiction of this Supreme Court. Petitioner admits that he never raised a Federal question in the trial court and it was only after the decision of the Court of Criminal Appeals was rendered and his first motion for a new trial was overruled did he even attempt to raise the question here presented in his Sec-

ond Motion for a New Trial, which Petitioner admits failed to fully set out the question presented. As a last desperate attempt to raise a Federal question, Petitioner attempted to file his Third Motion for Rehearing in order to obtain review before this Honorable Court. The Texas Court of Criminal Appeals has, on rare occasions, granted leave for filing a second motion for rehearing, but it has announced in *Webb v. State*, 110 Tex. Crim. Rep. 503, 7 S.W. 2d 562, 9 S.W. 2d 335, that the filing of second motions for rehearing "places an undue, unnecessary, and unprofitable burden upon the Court, and it is hoped that the members of the bar will refrain from attempting second motions for rehearing except it be on rare and extraordinary occasions.

With this view of the Court on filing of second motions for rehearing can it be left to doubt that the Texas court intends that its rule of procedure is to be strictly followed in properly raising the questions to be reviewed in the trial court?

Not only did Petitioner fail to raise a Federal question at the proper time, but when he did attempt to raise same he failed to properly point out with sufficient reference the particular clause of the Federal Constitution relied upon. In Petitioner's Third Motion for Rehearing (R. 15), he alleges that Article 802b, V.P.C., as amended by the 52nd Legislature of Texas on June 8, 1951, effective September 7, 1951, under which he stood convicted, violated Article I, Section 9, Clause 3, of the Constitution of the United States and in Petitioner's Brief (Petition, p. 4) in presenting his question to this Honorable Court, alleges that Article 802b of the Texas Penal

Code, as amended in 1951, is an Ex Post Facto Law, as applied to Petitioner, and has been given retroactive application to Petitioner in violation of Article I, Section 1, Clause 3, of the Constitution of the United States. Article 802b, V.P.C., as amended in 1951 by the 53rd Legislature of the State of Texas, being a State statute Respondent cannot see how, nor does Petitioner point out how Article 802b, V.P.C., can violate Article 1, Section 1, Clause 3 or Article 1, Section 9, Clause 3 of the Constitution of the United States. This Honorable Court has held that it will not take cognizance of a claim grounded upon a mere reference to the "Constitution of the United States," *Herndon v. Georgia*, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 471; *Harding v. Illinois*, 196 U.S. 78, 25 S. Ct. 176, 49 L. Ed. 344; *Capital City Dairy Co. v. Ohio*, 183 U.S. 238, 22 S. Ct. 120, 46 L. Ed. 171; or the "Constitution and Laws of the United States," *Oxley Stove Co. v. Butler County*, 166 U.S. 648, 17 S. Ct. 709, 41 L. Ed. 1149; or "due process of law," *Bowe v. Scott*, 234 U.S. 658, 34 S. Ct. 769, 58 L. Ed. 1141.

Since Petitioner makes a contention that Article 802b, V.P.C., as amended in 1951, is ex post facto as applied to Petitioner, Respondent can only assume that Petitioner is trying now to claim his rights have been violated under Article I, Section 10 of the Constitution of the United States, and in order to reply herein will proceed under that assumption.

Therefore, there being no Federal question properly presented and pursued in this case, this Honorable Court is without jurisdiction and Petitioner is without right to a Writ of Certiorari herein.

THE QUESTION PRESENTED

Whether Article 802b of The Texas Penal Code, as amended in 1951, is an Ex Post Facto Law, as applied to Petitioner, in violation of Article 1, Section 10 of the Constitution of the United States.

ARGUMENT AND AUTHORITIES ON THE QUESTION PRESENTED

It is necessary, to a limited extent, to discuss the history of the drunk driving statutes here involved and to quote them to some extent, and to see what interpretations have been placed on them by the Texas Court of Criminal Appeals. In 1941 the 47th Legislature of the State of Texas amended Article 802, Vernon's Penal Code, making the first offense of drunk driving a misdemeanor and at the same time enacted Article 802b, Vernon's Penal Code. Acts 1941, 47th Legislature, Page 819, Chapter 507, Sec. 1. Article 802b, V.P.C., which said Act provides as follows:

> "Art. 802b. Subsequent offense of driving while intoxicated; felony
>
> "Any person who has been convicted of the misdemeanor offense of driving or operating an automobile or other motor vehicle upon any public road or highway in this State or upon any street or alley within an incorporated city, town or village, while intoxicated or under the influence of intoxicating liquor, and who shall thereafter drive or operate an automobile, or other motor vehicle upon any public road or highway in this State or upon any street or alley within the limits of an incorporated city, town or village, while such person is intoxicated or under

> the influence of intoxicating liquor, *shall be guilty of a felony and upon conviction be punished by confinement in the penitentiary for any term of years not less than one (1) nor more than five (5).*" (Emphasis added).

Under Article 802b, V.P.C., the question arose as to whether said Article was an enhancement of the punishment statute. In two cases, *Broughton v. State* (1945), 148 Tex. Cr. Rep. 445, 188 S. W. 2d 393, and *Clifton v. State* (1951), ____ Tex. Cr. Rep. ____, 246 S. W. 2d 201, the Court of Criminal Appeals held that said Article was not an enhancement of punishment statute but created a new and independent crime of the grade of felony, an essential element of which was that the person charged had previously been convicted of a misdemeanor offense of driving while intoxicated. In the Broughton case the Court pointed out the distinction between enhancement statutes, Articles 61-64, Vernon's Penal Code, and Article 802b, Vernon's Penal Code, in the following language:

> "The object and purpose of the two statutes are different: one is to enhance the punishment while the other is to charge a felony and is jurisdictional."

In 1946, the case of *Burton v. State*, ____ Tex. Crim. R. ____, 194 S.W. 2d 398, was decided by the Texas Court of Criminal Appeals. In that case Appellant was convicted in the County Court of Wise County of the misdemeanor offense of driving a car while intoxicated. The Appellant had previously been convicted of driving a car while intoxicated in January,

1945, but the State's Attorney had failed to properly plead the previous conviction to bring the subsequent offense within Article 802b, V.P.C., and sought to use the previous conviction to challenge appellant's credibility as a witness and to show system. The Court of Criminal Appeals held that the prior conviction was not admissible for either of the above purposes and indicated that had the previous conviction been properly pleaded the subsequent offense could have been prosecuted as a felony.

Article 802b, Vernon's Penal Code, was amended on June 8, 1951, effective September 7, 1951, by the 52nd Legislature of the State of Texas, Acts 1951, 52nd Leg., p. 813, ch. 457, Sec. 1. Said Article 802b, as amended, provides as follows:

> "Art. 802b. Subsequent offense of driving while intoxicated; felony.
>
> "Any person who has been convicted of the misdemeanor offense of driving or operating an automobile or other motor vehicle upon any public road or highway in this state, or upon any street or alley within an incorporated city, town or village, while intoxicated or under the influence of intoxicating liquor, and who shall thereafter drive or operate an automobile or other motor vehicle upon any public road or highway in this state, or upon any street or alley within the limits of an incorporated city, town or village, while such person is intoxicated or under the influence of intoxicating liquor, *shall for each and every subsequent such violation be guilty of a felony;* and upon conviction shall be punished by a fine of not less than One Hundred ($100.00) Dollars nor more than Five Thousand ($5,000.00) Dollars or confinement

in the county jail not less than ten (10) days nor more than two (2) years, or by both such fine and imprisonment, or by confinement in the state penitentiary not to exceed five (5) years. As amended Acts 1951, 52nd Leg., p. 813, ch. 457, § 1." (Emphasis added.)

In 1953, the case of *Hill v. State*, ... Tex. Crim. R. ....., 256 S.W. 2d 93, was decided by the Texas Court of Criminal Appeals involving Article 802b, V.P.C. as above amended in 1951. The Appellant had been previously convicted of the misdemeanor offense of driving while intoxicated in 1947 and in 1952 the misdemeanor conviction of 1947 was used under the 1951 amendment to convict Appellant of a felony. The Appellant made two main contentions that concerns our case: (1) that since the 1947 conviction had been used in 1949 to convict Appellant of a felony under Article 802b, V.P.C. as passed in 1941, the 1947 conviction could not again be used in 1952, under Article 802b, V.P.C., as amended in 1951; and (2) that Article 802b, V.P.C., as amended in 1951, changes the punishment prescribed by Article 802b, as passed in 1941, and that since the punishment was different when Appellant committed the 1947 offense, a conviction under the 1951 amendment, in which a 1947 offense was alleged in order to give the Court jurisdiction, would be giving ex post facto effect to the 1951 amendment.

In answer to the Appellant's first contention the Court of Criminal Appeals reaffirmed the *Braughton* and *Clifton* cases, supra, in holding:

"Appellant's contention is that the rule in Kinney v. State, Tex. Crim. App., 79 S.W. 570,

would prevent the re-use of the 1947 misdemeanor, since it had successfully been used in the 1949 felony conviction.

"This Court has not held the rule in the Kinney case applies to Article 802b, Vernon's Ann. P.C., and we do not now feel inclined to so hold. To the contrary, we have held in Broughton v. State, 148 Tex. Cr. R. 445, 188 S.W. 2d 393, and Clifton v. State, Tex. Cr. App., 246 S.W. 2d 201, that said article is not an enhancement of punishment statute but creates a new and independent crime of the grade of felony, an essential element of which is that the person charged has previously been convicted of a misdemeanor offense of driving while intoxicated. The additional allegation of the prior misdemeanor conviction thus vests the District Court with jurisdiction. It is only in cases arising under Articles 61-64, Vernon's Ann. P.C., that the rule in the Kinney case, and those which follow it, apply. We hold that the prior use of the misdemeanor conviction does not prevent its subsequent re-use for the same purpose and that such subsequent re-use does not violate the constitutional prohibition against placing an accused twice in jeopardy. This Court, as now constituted, is not inclined to extend the rule in the Kinney case, supra."

And in answer to Appellant's second contention the Court said:

"Bill of exception No. 3 asserts that the 1951 amendment changes the punishment prescribed by the 1941 act and contends that, since the punishment was different when appellant committed the 1947 offense, a conviction under the 1951 amendment, in which a 1947 offense was al-

leged in order to give the court jurisdiction, would be giving ex post facto effect to the 1951 amendment.

"Appellant cites from Thacker v. Commonwealth, 228 Ky. 819, 16 S.W. 2d 448, 449:

" 'Our opinions so holding, and which are in complete accord with those from other jurisdictions upon the subject, are based upon the proposition that it is incompetent for the Legislature to provide for an increased punishment for a second conviction, when the first offense of which defendant was convicted was committed before the enactment of the statute so prescribing.'

"We now analyse the two acts:

"That portion of the 1941 act which prescribes the punishment reads as follows:

" '* * * shall be guilty of a felony and upon conviction be punished by confinement in the penitentiary for any term of years not less than one (1) nor more than five (5).'

"That portion of the 1951 amendment which prescribes the punishment reads as follows:

" '* * * be guilty of a felony; and upon conviction shall be punished by a fine of not less than One Hundred ($100.00) Dollars nor more than Five Thousand ($5,000.00) Dollars or conconfinement in the county jail not less than ten (10) days nor more than two (2) years, or by both such fine and imprisonment, or by confinement in the state penitentiary not to exceed five (5) years.'

"If the punishment provided by the 1951 amendment had been materially increased, we would be inclined to agree with appellant's contention. But we do not so construe the change. Between 1941 and 1951, all citizens were charged with the knowledge that if they vio-

lated the driving while intoxicated statute, they would receive certain misdemeanor punishishment on their first conviction, and on the second they might be assured of a stay in the penitentiary if convicted.

"Since 1951, no such warning or assurance exists. All citizens are now charged with the knowledge that if they violated that on a second conviction they may go to the penitentiary or they may be treated more leniently and receive only a fine or jail sentence.

"This we feel to be the only logical interpretation to be given to the rule expressed in the Thacker case and, accordingly, overrule appellant's contention in this respect."

Now let us turn to the facts and contentions of petitioner in this case. As before stated in the Statement of the Case, Petitioner was duly and legally indicted and convicted for the felony offense of driving while intoxicated under Article 802b, V.P.C., as amended in 1951. As basis for jurisdiction for such conviction, the misdemeanor conviction for driving while intoxicated in 1950 was plead in the indictment (R-1).

That Article 802b, V.P.C. as enacted in 1941 and as amended in 1951 is not an enhancement of the punishment but created a new and independent crime of the grade of felony is not and cannot be contested by Petitioner. *Broughton v. State, Clifton v .State* and *Hill v. State, supra.*

That Article 802b, V.P.C., as amended in 1951, did not increase the punishment over the 1941 Act but reduced the punishment cannot be denied. *Hill v. State, supra.*

The Petitioner contends that under *Burton v. State, supra,* the effect of Article 802b was to create the felony offense of drunk driving separate and apart from the misdemeanor offense, so that a second violation could be prosecuted either as a misdemeanor or as a felony, as the State might elect. That the 1951 amendment went further than to change the punishment in that the amendment provided that any person who has been convicted of the misdemeanor offense of drunk driving and who shall thereafter drive while drunk "shall for each and every subsequent such violation be guilty of a felony." That by that provision of the amendment it was no longer possible for a second offender to be prosecuted under the misdemeanor statute as could formerly be done under the holding of *Burton v. State, supra.* That as a result the effect of the 1951 amendment was to increase the punishment for a second offense by mandatorily making his second offense a felony, whereas prior to such amendment his second offense could be a misdemeanor under Art. 802 V.P.C., or a felony under Art. 802b, V.P.C., at the election of the prosecuting attorney.

Now let us examine this contention of Petitioner, which is the essence of his whole case, and see if such contention has any merit.

In the first place nowhere does Petitioner cite any cases to support his theory. In the second place, Petitioner places an improper and misleading interpretation on *Burton v. State, supra.* The Court of Criminal Appeals did not say that under Article 802b, V.P.C., the prosecuting attorney, if he saw fit, and at his election, could proceed against a second offender un-

der the misdemeanor statute by merely filing a complaint and information in the county court without mentioning the previous misdemeanor convction or he could proceed aganst such second offender under the felony statute by indictment alleging the previous misdemeanor conviction. What the Court said and all the Court said was, and we quote:

> "Bill No. 2 reflects the following: While appellant was on the witness stand in his own behalf he was asked by the State's attorney if he had not, in January, 1945, in this same county court, been convicted of driving a car while intoxicated, and, over the objection of his attorney, he was caused to answer that he had been thus convicted. The first conviction for drunken driving is a misdemeanor, and therefore not a felony and not admissible in order to affect one's credibility, if it does so. It had also been held that the admission of extraneous offenses not involving moral turpitude are confined to felonies only. Branch's P. C., Sec. 169, p. 102. True it is that a second offense for drunken driving could be made the basis of a felonious prosecution, but the instant prosecution pleads only one offense, and makes no mention of a previous conviction, thus falling within the category of a misdemeanor. See Art. 802b, Vernon's Ann. P.C., for the first offense, a subsequent offense being a felony, if *properly* pleaded. As a misdemeanor drunken driving is not an offense involving moral turpitude, the admission of appellant's previous conviction therefor was not admissible. It is shown by the

bill of exceptions that the trial court was of the opinion that such prior conviction was admitted as an extraneous offense because it was thought same showed system. We think such previous conviction failed to show system, and did not come within the exceptions allowing such proof."

Before further discussing this holding of the Court, let us turn to Respondent's third proposition that under Art. 802b, V.P.C., as enacted in 1941, the language was mandatory that a person committing a second or subsequent offense of drunk driving shall be guilty of a felony. See Article 802b, V.P.C. as enacted in 1941 hereinabove set forth noticing in particular the underlined portion thereof. The language in the 1951 amendment is substantially the same as that in 1941 and therefore in both statutes it was and is mandatory that the subsequent offenders shall be guilty of and proceeded against as a felony.

It is a well known fact, of which this Honorable Court can take judicial knowledge, that under statutes such as we are confronted with here, and enhancement of the punishment statutes, the problem continually confronts States attorneys in searching out previous convictions. This is so because of the problem of changing offices, shortage of personnel, and the cost and time of maintaining proper files of offenses previously committed in the same county, and in the situation of previous offenses committed in other counties the problem becomes even more acute.

Furthermore, in such cases the well known principal applies that when the offense for which the accused is tried includes within it lesser offenses, a conviction of the lower grade acquits him of the higher, and he may not later be tried for the higher offense. *Thomas v. State*, 40 Tex. 36; *Munoz v. State*, 81 Tex. Crim. Rep. 629, 197 S.W. 871; *DeLeon v. State*, 55 Tex. Crim. Rep. 39, 114 S.W. 828.

With these propositions in mind, let us now examine the holding in *Burton v. State, supra.* The prosecuting attorney failed to discover the previous misdemeanor conviction in time, or negligently failed to properly plead it and then tried to use it for purposes which the court held were improper. The Court merely said that the second offense could be a felony if properly pleaded but the prosecution plead only one offense which fell in the category of a misdemeanor.

Therefore the 1951 amendment did not impose a new or different or increased punishment by mandatorily making a second violation a felony because under both Article 802b, V.P.C. and the 1951 amendment it was mandatory that a second offense constituted a felony. That *Burton v. State* is still the law that a subsequent offense for drunken driving could be the basis for a felony if properly pleaded under 802b, V.P.C., and if not constitutes only a misdemeanor. That the 1951 amendment did not go further than to change the punishment for the felony offense, which said change did not increase but decreased the punishment and therefore was not ex post facto. *Hill v. State, supra.*

Petitioner cites at some length *Clifton v. State*, ... Tex. Crim. R. ..... 246 S.W. 2d 201, and in his Petition (Petition, p. 5) states "the felony drunk driving statute involved Article 802b, as amended in 1951, has been construed by the Court of Criminal Appeals of Texas to create a new offense with material changes insofar as punishment is concerned."

It is true that the Court said Article 802b V.P.C., as amended, made material changes, especially insofar as the matter of punishment is concerned, but the Court did not hold that a new offense was created.

This statement by the Court was mere dicta and what the Court held was that the case before it was tried prior to the amendment and therefore Article 802b, V.P.C., as amended in 1951, was not before the Court at that time for the Court to pass on.

Subsequently, in the case of *Hill v. State*, *supra*, when the amendment was squarely before the Court, and was passed on by the Court, they held, as hereinabove fully set out, that the material changes in the punishment was not increased so as to render the 1951 amendment Ex Post Facto, but to the contrary, was decreased.

Petitioner was duly and properly tried in a Texas Court for a Texas crime and since petitioner has not raised a Federal question with any merit, this Honorable Court is not concerned.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

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